Volume 74
Issue 2 *Dickinson Law Review - Volume 74, 1969-1970*

1-1-1970

Arnett v. State: Length of Hospitalization Admissible as Tending to Prove an Intent to Kill

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ARNETT v. STATE: LENGTH OF HOSPITALIZATION ADMISSIBLE AS TENDING TO PROVE AN INTENT TO KILL

In *Arnett v. State*,[1] the Indiana Supreme Court held that evidence of the victim's length of hospitalization was admissible for jury consideration when the defendant was charged with assault and battery with intent to kill. The majority relied on an analogy between the length of hospitalization and case law on nature and extent of injuries and on an analogy between length of hospitalization and prognosis[2] or future condition. Judge Hunter, in dissent, felt the evidence could involve too many factors unrelated to the intent element to be admissible.[3] This decision extends the law of admissibility of evidence of nature and extent of injury and of prognosis or future condition as tending to prove intent to kill by admitting evidence of length of hospitalization as relevant to intent. The purpose of this Note is to analyze *Arnett* in light of the law of admissibility of evidence to show an intent to kill. The analysis will focus on four areas: the general rule of relevancy, and its more particular rules concerning nature and extent of injuries, prognosis or future condition, and length of hospitalization. The Note will then comment on the validity of the *Arnett* decision in light of the four areas examined.

Arnett v. State arose out of a bar fight between the defendant and Eldrid Bryant in which Bryant was beaten and shot. The trial court found the defendant guilty of assault and battery with intent to kill. During the trial, the victim was permitted to testify, over the objection of the defendant, as to the length of time he spent in various hospitals. The defendant appealed contending that the lower court committed reversible error by allowing the testimony as to length of hospitalization. The defendant reasoned that the evidence was irrelevant to the issue of intent, prejudicial to the rights of an accused to a fair trial, and its admission abusive of the trial court's discretion.

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1. 244 N.E.2d 912 (Ind. 1969).

2. Prognosis: "A prediction of the duration, course, and termination of a disease, based on all information available in the individual case and knowledge of how the disease behaves generally." BLAKISTON'S NEW GOULD MEDICAL DICTIONARY 968 (2d ed. 1956).

3. Judge Jackson wrote an opinion concurring with the result of the majority but agreeing with the reasoning of Judge Hunter.

RELEVANCY

The general rule of relevancy is that only evidence which is relevant is admissible and relevant evidence is always admissible unless prohibited by some specific rule.[4] One of the questions raised in the application of this general rule is whether the degree of persuasiveness of a relevant fact should determine admissibility. Many courts have received or discarded evidence on the basis of its strength in producing its desired result.[5]

The Indiana view, implicit in the *Arnett* decision, was established in *Deal v. State.*[6] The prosecution, in a murder trial, introduced testimony by a witness that he heard a man, who sounded like the defendant, say he shot a woman in the arm and killed a man. The evidence was held admissible as tending to prove it was the defendant who shot the deceased, when it had already been established that the wife of the deceased had been shot in the arm.[7] The court stated that, since the evidence slightly tended to prove defendant's guilt, it should be admissible.[8] There are two basic

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4. This principle, then, does not mean that anything that has probative value is admissible; this would be an entire misconception. The true meaning is that everything having a probative value is "ipso facto" entitled to be assumed to be admissible, and that therefore any rule of policy which may be valid to exclude it is a superadded and abnormal rule. . . . [T]hese rules of policy appear as merely so many reserved spaces in the vast territory of logically probative material.

1 J. WIGMORE, EVIDENCE § 10 at 293-94 (3d ed. 1940).

5. Cases holding evidence admissible if it tends, even though slightly, to prove the issue: Holmes v. Goldsmith, 147 U.S. 150 (1892); People v. Kafoury, 16 Cal. App. 718, 117 P. 938 (1911); Wilson v. State, 247 Ind. 680, 221 N.E.2d 347 (1966); Knapp v. State, 168 Ind. 153, 79 N.E. 1076 (1907); Deal v. State, 140 Ind. 354, 39 N.E. 930 (1895); Stevenson v. Stewart, 11 Pa. 307 (1849). Cases holding evidence admissible if it makes a reasonable inference: Levinson v. State, 54 Ala. 520 (1875); Lange Cable Tool D. Co. v. Barnett Petroleum Corp., 142 S.W.2d 833 (Tex. Civ. App. 1940). Cases requiring the inference to be supported by a preponderance of weight or probability: People v. Jeffers, 372 Ill. 590, 25 N.E.2d 35 (1940); Standafer v. First Nat. Bank of Minneapolis, 236 Minn. 123, 52 N.W.2d 718 (1952); Cohn v. Saidal, 71 N.H. 558, 53 A. 800 (1902).

6. 140 Ind. 354, 39 N.E. 930 (1895); *accord*, Wilson v. State, 247 Ind. 680, 221 N.E.2d 347 (1966) (photographs of a homicide victim lying in a pool of blood and blood-stained clothing admissible where the jury had a choice of first or second degree murder); Durst v. State, 190 Ind. 133, 128 N.E. 920 (1920); Cleveland, C.C. & St. L. Ry. v. Starks, 58 Ind. App. 341, 106 N.E. 646 (1914); McIntosh v. State, 151 Ind. 251, 51 N.E. 354 (1898); Stevenson v. Stewart, 11 Pa. 307 (1849) (where the defendant contended his signature and the note were forged in an action on a debt, evidence was admissible that the defendant had borrowed money from someone other than the plaintiff before and after the date on the note).

7. Deal v. State, 140 Ind. 354, 39 N.E. 930 (1895).

8. *Id.* at 372, 39 N.E. at 935.

reasons for the view that evidence should be admitted if it even slightly tends to settle a litigated issue. The first reason focuses on the quantity of evidence that a party should be required to produce in support of his contention on an issue. The position is that the determination of a contested fact or the establishment of a necessary inference should not hinge on one proven fact but that the conclusion should be corroborated by *any and all* information which could possibly be construed as relating to it.[9] The second argument behind the view permitting the admissibility of evidence even slightly bearing upon a litigated issue is that the conclusiveness of any evidence goes to its weight and not to its admissbility:[10]

> . . . [T]he convincing power of the inference is for the jury, when weighing the value of the fact proved; not for the judge, in determining the bare question of its relevancy. It is sufficient for the purposes of his inquiry, that it has some affinity with the principal inquiry, though this may be weak or remote.[11]

Another line of cases concludes that evidence which does not relate to the contested issue with a reasonable preponderance of weight is inadmissible.[12] In *Cohn v. Saidal*,[13] the plaintiff brought an action for malicious prosecution against a group of men he believed were attempting to injure his tailoring business. The plaintiff had the burden of proving malice on the part of the defendants, which meant showing they had no reasonable grounds for a cause of action against him. To support his burden, the plaintiff introduced evidence that the defendants filed motions for a voluntary non-suit. The plaintiff's contention was that from the voluntary non-suit the inference could be drawn that the defendants knew they had no reasonable grounds for a cause of action against the plaintiff and that the defendant's prosecution was, therefore, malicious. The lower court refused to allow the evidence and, in affirming, the New Hampshire Supreme Court held:

> The probative bearing of the evidence upon the point in issue is not logically clear and plain, but doubtful and involved, leading to no certain result. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed.[14]

The general requirement of relevancy is at the center of the law of admissibility of evidence. From the practical problems of determining whether evidence is relevant, courts have decided that

9. *Id.* at 373, 39 N.E. at 936.
10. *Id.*
11. Stevenson v. Stewart, 11 Pa. 307, 310 (1849).
12. *See* cases cited note 5 *supra*.
13. 71 N.H. 558, 53 A. 800 (1902).
14. *Id.* at 568, 53 A. at 805.

it is the degree of persuasion of the relevant fact which determines either the admissibility of evidence or the weight which a jury will place on it. Nature and extent of injuries, prognosis or future condition and length of hospitalization will now be analyzed to determine if they are relevant in some degree of persuasion to an issue of intent to kill.

Nature and Extent of Injury Evidence

A vast majority of the courts have held that evidence showing the nature and extent of the victim's injuries is admissible as tending to prove an intent to kill.[15] In *Claypoole v. Commonwealth*,[16] the defendant was charged with malicious shooting at and wounding another with intent to kill when he shot the victim in the leg. During the trial, the attending physician testified, among other things,[17] as to nature and extent of the wound. The Kentucky Court of Appeals rejected the defendant's contention that the admission of this testimony was reversible error. The court recognized that evidence concerning the nature and extent of injury was admissible as relevant to intent to kill.[18] Other examples

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15. *See* cases cited notes 16, 19-23, 25 *infra*.

16. 337 S.W.2d 30 (Ky. 1960).

17. Attending physician also testified as to prognosis of victim's future condition and inability to perform manual labor. *Claypoole* went on to hold the lower court committed reversible error in allowing the evidence of prognosis. This part of the decision will be discussed at text accompanying note 47 *infra*.

18. 337 S.W.2d at 32; *accord*, People v. Lathrop, 49 Cal. App. 63, 192 P. 722 (1920), which held testimony by the victim that he had not been able to work for a month and a half and that the shotgun wound to the leg bothered him at time of trial was admissible when defendant was charged with assault with intent to commit murder; Harmon v. State, 48 Fla. 44, 37 So. 520 (1904), which held testimony that victim suffered great pain from knife wound admissible when defendant was charged with assault with intent to murder; King v. State, 21 Ga. 220 (1857), which held:

> The extent of the wound and the nature of it, inflicted on the person on whom the assault was made, when there was one, is always involved in the issue. It has much to do with proving the intent of the assailant.

Id. at 225; Williams v. Commonwealth, 229 Ky. 580, 17 S.W.2d 706 (1929), which held the exhibition of the victim's blood-stained clothes and the victim's showing his wound to the jury were admissible when the defendant was charged with malicious shooting and wounding with intent to kill; Murphy v. State, 43 Neb. 34, 61 N.W. 491 (1894), which held testimony by the victim that his general health had deteriorated and that he was still not able to work as of the time of the trial admissible when the defendant was charged with assault with intent to inflict great bodily injury; State v. Owens, 224 S.C. 533, 80 S.E.2d 113 (1954), which held testimony by the victim, a convict, as to the nature and extent of the injuries to his back and legs and the medical and surgical attention to them ad-

of evidence of nature and extent of injury admissible to show intent include prolonged disability as a result of the wound,[19] location of the wound or the path of the bullet,[20] the permanency of the wound,[21] and the duration of recovery or confinement to bed.[22]

Courts which hold that evidence of the nature *and* extent of injuries is admissible as relevant to an intent to kill justify their holdings on two basic premises. First, it is reasoned that the nature of a wound is to be distinguished from its extent.[23] For example, an assaulter may deliberately crush a person's hands, stab him in the arm, and break one of his legs and thereby inflict extensive injuries on his victim but still never intend to kill him. On the other hand, a person may stab his victim in the chest, intending to kill him, and accidentally miss any vital areas, and thereby inflict only slight injury which requires little treatment. The significance is not the extent of the wound itself but the nature of its seriousness which reflects intent. Therefore, since courts speak in terms of nature *and* extent of injury, they seem to imply that evidence

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missible when the defendant, a chain gang guard, wounded the victim with a shotgun and was charged with assault and battery with intent to kill and murder.

19. Damron v. Commonwealth, 313 S.W.2d 854 (Ky. 1958), which held the victim's testimony that he had limited use of his hand because of the wound was admissible when the defendant was charged with maliciously striking and wounding with a knife, a deadly weapon, with intent to kill; Roberts v. State, 4 Md. App. 209, 241 A.2d 903 (1968), which held the victim's testimony that his right arm and leg were paralyzed was admissible when defendant shot victim in back of the head with a .22 calibre rifle and was charged with assault and battery with intent to kill.

20. Burton v. State, 37 Ala. App. 396, 69 So. 2d 477 (1954), which held attending physician's testimony as to the victim's shotgun wounds to his back was admissible when the defendant was charged with assault with intent to murder; People v. Kafoury, 16 Cal. App. 718, 117 P. 938 (1911), which held the victim's testimony that the first of three shots from the defendant broke her hip and that he choked her into unconsciousness was admissible when the defendant was charged with assault with a deadly weapon, with intent to commit murder.

21. People v. Manning, 320 Ill. App. 143, 50 N.E.2d 118 (1943). The defendant was convicted of assault with a deadly weapon. He had hit the victim on the head with a truck crank handle when the victim blocked the defendant's beer delivery truck in an alley. Medical testimony of the extent of the victim's injuries and the degree of their permanency was held admissible to show the weapon was dangerous and the nature of the assault.

22. Bailey v. State, 24 Ala. App. 339, 135 So. 407 (1931), which held testimony that the victim was confined to bed after the defendants took the victim outside of town and beat him up was admissible when the defendants were charged with assault to murder but convicted of assault and battery; Jackson v. State, 19 Ala. App. 339, 97 So. 260 (1923), which held that the victim's testimony that it was about 10 days before he could leave the house was admissible in an assault to murder trial; People v. Zounek, 10 N.Y. Crim. 251, 20 N.Y.S. 755 (Sup. Ct. 1892), which held the victim's testimony that the blow from a piece of steel knocked him unconscious for a length of time was admissible in a trial of assault with a deadly weapon and with intent to kill.

23. *See* Harmon v. State, 48 Fla. 44, 37 So. 520 (1904); King v. State, 21 Ga. 220 (1857); State v. Remington, 50 Or. 99, 91 P. 473 (1907).

of extent is inadmissible unless shown to be related to the nature of the injury.

The second premise behind the admission of nature and extent of injury evidence is that when no evidence is available which directly reveals a person's mental intent, such as the defendant's own confession or the admission of a conversation in which the defendant related his intent to someone else, evidence of an outward manifestation of the alleged intent will serve to prove intent:[24]

> No better evidence could be adduced, we think, as to the intent of the defendant to kill at the time he fired the shot, than it entered a vital part, and its serious consequences. . . . It cannot be doubted but that the serious wounding of [the victim] in a vital part was some stronger evidence of defendant's intent to kill him than if he had wounded him but slightly, in some part not vital. From this wounding, in the absence of countervailing tesimony or circumstances, the law will presume an intent to kill, and this evidence only tended to show what the law presumes.[25]

Using these two premises as the foundation, most courts have held that evidence as to nature and extent of injuries is relevant to an intent to kill.

Some cases have found that certain evidence of the nature and extent of injuries was erroneously admitted but not sufficiently prejudicial to the defendant to constitute reversible error. Police officer's testimony of the nature of his wound and the operation necessary to remove the bullet was "erroneously offered" but, in light of the evidence and the fact that the defendant was sentenced to life imprisonment instead of death, it was not "substantially prejudicial."[26] In *Meredith v. State*,[27] the Supreme Court of Indiana decided photographs of the escape car, the pistol, and the dead victim were admissible in a murder trial. The majority in

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24. *See* cases cited notes 16, 19-23 *supra*, note 25 *infra*.

25. State v. Grant, 144 Mo. 56, 63, 45 S.W. 1102, 1103 (1898), *rev'd on other grounds*, State v. Blitz, 171 Mo. 530, 71 S.W. 1027 (1903).

26. People v. Sustak, 15 Ill. 2d 115, 125, 153 N.E.2d 849, 855 (1958). The defendant was indicted for murder when he wounded a police officer who was chasing him after he had shot and killed another man. For the proposition that relevant evidence will not be excluded merely because it is prejudicial, *see* People v. Love, 53 Cal. 2d 843, 350 P.2d 705, 3 Cal. Rptr. 665 (1960); People v. Ford, 175 Cal. App. 2d 109, 345 P.2d 573 (1959); Brooks v. State, 69 Ga. App. 697, 26 S.E.2d 549 (1943); State v. Remington, 50 Or. 99, 91 P. 473 (1907); State v. Owens, 224 S.C. 533, 80 S.E.2d 113 (1954); Langley v. State, 129 Tex. Crim. 254, 86 S.W.2d 755 (1935).

27. 247 Ind. 233, 214 N.E.2d 385 (1966).

Meredith felt the evidence may be prejudicial but that the "jury is entitled to all the details,"[28] while the dissent believed the constant repetition of the evidence inflamed the minds of the jurors and did not relate to the elements of the crime charged.[29]

Other cases have held evidence as to nature and extent of injury inadmissible.[30] The leading cases in support of the minority view are *People v. Carter*[31] and *People v. Nicholopoulos*.[32] In *Carter*, the defendant sought to introduce evidence that the attending physician told the victim that if she stayed at the hospital she would have only a small scar but that if she left they would guarantee nothing. After the victim left the hospital, she lost the use of her eye and later had to have it removed. The defendant contended the evidence indicated that the effect of the injury resulted from the victim's failure to provide for herself, rather than from the injury itself. The Illinois Supreme Court denied the defendant's contention but refused to admit the evidence of the seriousness of the injury, holding that "specific intent . . . is found, not from the nature or seriousness of the injury inflicted, but from the proof of the reckless character and manner of the assault. . . ."[33] The *Nicholopoulos* court relied upon *Carter* to hold that a police officer's testimony of blood on the floor, the victim's shirt, and the stretcher, and of the condition of the victim when he was in the hospital was inadmissible.[34]

Case law appears to support the rule that evidence of the nature and extent of injury should be admitted as tending to prove intent. Those courts holding against admitting such evidence, like *Carter* and *Nicholopoulos*, have been limited, as shown by the number of cases distinguishing them,[35] to their particular fact situations.

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28. *Id.* at 238, 214 N.E.2d at 388.

29. *Id.* (dissenting opinion).

30. People v. Love, 53 Cal. 2d 843, 350 P.2d 705, 3 Cal. Rptr. 665 (1960) (opinion by witness of powder burn on victim's shirt inadmissible); People v. Carter, 410 Ill. 462, 102 N.E.2d 312 (1951); Napier v. State, 225 Ky. 384, 9 S.W.2d 107 (1928) (gory details of death, such as photograph of facial expression of a victim as she died, inadmissible in a murder trial).

31. 410 Ill. 462, 102 N.E.2d 312 (1951).

32. 25 Ill. App. 2d 451, 185 N.E.2d 209 (1962). The defendant was charged with assault with intent to murder. The defendant entered the victim's restaurant, smelling of alcohol and staggering, and proceeded to enter into an argument with the victim which led to his shooting. The question before the jury was whether the defendant could be convicted of assault with intent to murder, or whether, because of his intoxication, he had no intent to kill. For testimony in controversy and holding, see text accompanying note 34 *infra*.

33. 410 Ill. at 467, 102 N.E.2d at 314 (1951).

34. 25 Ill. App. 2d 451, 185 N.E.2d 209 (1962).

35. In People v. Radford, 87 Ill. App. 2d 308, 232 N.E.2d 100 (1967), the defendants were charged with theft and conspiracy to commit theft. Three of the defendants allegedly schemed to break an arm of one of the defendants, push him in front of a car and then collect personal injury damages. The defendant, Radford, appealed contending error when the lower court permitted the defendant, Thomas, to display the scar which he

Also, both *Carter* and *Nicholopoulos* involved evidence which emphasized the *extent* of the victim's injuries, and evidence of *extent* of the injuries, unlike their nature, does not necessarily reflect an intent to kill. Moreover, the *Carter* court indicated that the intent of the defendant could have been established by more concrete facts relating the extent of the victim's injury to its nature.[36]

Prognosis or Future Condition Evidence

A split of authority exists concerning the admissibility of evidence of prognosis or future condition of the victim as tending to prove intent. Cases which hold prognosis admissible as tending to prove intent justify their decisions on three grounds: the evidence in question is relevant to the issue of intent,[37] the reception

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testified came from the broken arm. In affirming the lower court, the Illinois Court of Appeals distinguished *Nicholopoulos* saying that there the prosecution emphasized the gory details. In People v. Doyle, 76 Ill. App. 2d 302, 222 N.E.2d 205 (1966), the defendant was indicted with attempted murder and aggravated battery. The police had chased the defendant and two others in a Chicago alley and the defendant had shot one of the policemen in the stomach with a shotgun. The defendant was convicted of attempted murder. On appeal, the court held evidence of the policeman's injuries admissible and distinguished *Nicholopoulos* by saying that case involved assault with intent to murder, while in the instant case the trial court had no way of knowing upon which charge the jury would act. People v. Franklin, 74 Ill. App. 2d 392, 220 N.E.2d 872 (1966), involving a conviction of aggravated battery after the defendant stabbed the victim thirteen times. The defendant pleaded self-defense. In holding evidence of the victim's injuries admissible, the court distinguished *Nicholopoulos* by saying that case involved a plea of intoxicated inability to form an intent to murder but that the instant case involved a plea of self-defense. In People v. Cunningham, 73 Ill. App. 2d 357, 218 N.E.2d 827 (1966), the defendant was convicted of attempt to murder after he was drinking at a tavern and shot a number of people at the bar. The defendant appealed on the grounds that the lower court erred in admitting evidence of the extent of injury to the person mentioned and to others not mentioned in the indictment. The court held the evidence as to the nature and extent of the injuries to the person mentioned in the indictment admissible but that the other was not. It distinguished *Nicholopoulos* because the prosecution emphasized the gruesome nature of the injuries, while in the instant case it had not. People v. Tilden, 50 Ill. App. 2d 354, 200 N.E.2d 33 (1964), involved a murder conviction. The defendant contended on appeal that articles of clothing worn by the uncle of the victim on the night of the shooting, although not admitted into evidence, were improperly displayed to the jury. The trial court allowed the display because the uncle too, was shot in the chest during the fight which killed his niece. The defendant cited *Nicholopoulos* for support but the court distinguished the case, saying the display in the present case was relevant to questions of who fired the gun and whether there was malice, while in *Nicholopoulos* the question was whether the defendant was too intoxicated to have an intent to murder.

36. 410 Ill. 462, 102 N.E.2d 312 (1951).

37. People v. Manning, 320 Ill. App. 143, 50 N.E.2d 118 (1943) (med-

of such evidence lies within the discretion of the trial court,[38] and the jury needs this evidence as a "yardstick" for fixing punishment.[39] In *Gayer v. State*,[40] the leading Indiana case on prognosis evidence, the defendant was charged with assault and battery after allegedly beating an old man in a tavern. He was convicted and appealed on the grounds that the lower court erred in admitting the attending physician's testimony that the victim may never improve satisfactorily enough to care for himself. The Indiana Supreme Court held that the evidence was admissible for jury consideration on whether the defendant's acts were done in a rude, insolent and angry manner, as required by statute.[41] The majority recognized a split of authority, citing *Claypoole v. Commonwealth*[42] and *Commonwealth v. D'Agostino*[43] for the opposing views, and

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ical testimony as to extent of injuries and degree of permanency of effects); Graves v. State, 439 P.2d 476 (Nev.), *cert. denied*, 393 U.S. 919 (1968) (physician's testimony as to permanency); Griffith v. State, 142 Tex. Crim. 304, 152 S.W.2d 349 (1941) (physician's testimony that victim had permanent paralysis from waist down). When ruling the evidence relevant, some cases use *res gestae* to refer to relevancy. *See, e.g.*, Phillips v. State, 161 Ala. 60, 49 So. 794 (1909); Bailey v. State, 24 Ala. App. 339, 135 So. 407 (1931); Jackson v. State, 19 Ala. App. 339, 97 So. 260 (1923); People v. Zounek, 10 N.Y. Crim. 251, 20 N.Y.S. 755 (Sup. Ct. 1892); Root v. State, 169 Tex. Crim. 382, 334 S.W.2d 154 (1960). For a discussion of *res gestae* and relevancy, see Bornhouser, *Res Gestae: A Synonym for Confusion*, 20 BAYLOR L. REV. 229 (1968).

38. *E.g.*, Adams v. State, 33 Ala. App. 136, 31 So. 2d 99, *cert. denied*, 249 Ala. 294, 31 So. 2d 105 (1947); People v. Lathrop, 49 Cal. App. 63, 192 P. 722 (1920); People v. Ciucci, 8 Ill. 2d 619, 137 N.E.2d 40, *U.S. reh. denied*, 357 U.S. 924 (1956); Meredith v. State, 247 Ind. 233, 214 N.E.2d 385 (1966); Loveless v. State, 240 Ind. 534, 166 N.E.2d 864 (1960); Hergenrother v. State, 215 Ind. 89, 18 N.E.2d 784 (1939); Murphy v. State, 43 Neb. 34, 61 N.W. 491 (1894).

39. Gambrell v. Commonwealth, 282 Ky. 620, 139 S.W.2d 454 (1940). Two defendants were convicted of malicious wounding after one of them shot the victim. The Kentucky Court of Appeals upheld the trial court's admission of the physician's testimony as to the future effects of the victim's injuries on the grounds that it was proper for the jury to consider in fixing the punishment. *But cf.* Claypoole v. Commonwealth, 337 S.W.2d 30 (Ky. 1960), discussed at text accompanying note 47, *infra*, which excluded such testimony but did not overrule or distinguish *Gambrell*.

40. 247 Ind. 113, 210 N.E.2d 852 (1965); *accord*, People v. Manning, 320 Ill. App. 143, 50 N.E.2d 118 (1943); Murphy v. State, 43 Neb. 34, 61 N.W. 491 (1894); Griffith v. State, 142 Tex. Crim. 304, 152 S.W.2d 349 (1941); Jowell v. State, 44 Tex. Crim. 328, 71 S.W. 286 (1902).

41. IND. STAT. ANN. § 10-403 (1956 Replacement).

42. 337 S.W.2d 30 (Ky. 1960).

43. 344 Mass. 249, 182 N.E.2d 133, *cert. denied*, 371 U.S. 852 (1962). The defendant was charged with assault and battery " 'by means of a certain dangerous weapon, to wit: a sharp instrument, a more particular description of which is . . . unknown.' " *Id.* at 250. Evidence was admitted, over the defendant's objection, which included photographs of the lacerations, doctor's testimony that the scars would be permanent, and testimony about the presence of blood on the victim's clothes. The evidence concerning the future physical condition of the victim was held admissible to determine whether the injury was inflicted by a sharp instrument. *Accord*, Horowitz v. Bokron, 337 Mass. 739, 151 N.E.2d 480 (1958); Graves v. State, 439 P.2d 476 (Nev.), *cert. denied*, 393 U.S. 919 (1968).

chose to side with *D'Agostino* which held that the trial court had discretionary powers on the admissibility of such evidence.

On the other hand, cases holding prognosis evidence inadmissible say the court abused its discretion,[44] the evidence was prejudicial to the rights of a fair trial,[45] and the evidence did not relate to the issue of intent.[46] It appears from the decisions denying the admissibility of prognosis evidence that the questions as to relevancy, prejudice, and abuse of discretion could be overcome only if the prognosis or future condition were directly related to the nature and extent of the victim's injuries. In *Claypoole v. Commonwealth*,[47] for example, the Kentucky Court of Appeals recognized the general rule of admissibility of evidence of nature and extent of injury but refused to admit a prognosis that the victim may not be able to do any manual labor.[48] Hypothetical questions concerning what results might be expected from the type of injury the victim suffered have also been held inadmissible,[49] as have opinions as to the victim's future pain and suffering.[50]

The divergence of authority on the question of the admissibility of prognosis evidence to prove an intent to kill stems from the difference in opinion as to what medical facts can comprise a prognosis. Those courts admitting prognosis evidence would follow the conclusion that a pessimistic prognosis reflects the serious nature and extent of the original injury,[51] from which the jury could infer an intent to kill. On the other hand, those courts excluding the evidence would feel that prognosis may reflect extent but

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44. State v. Redfield, 73 Iowa 643, 35 N.W. 673 (1887). The defendant was convicted of assault with intent to inflict great bodily injury. The victim testified as to the nature and extent of his injuries, then the State called a physician to get testimony as to what results might be expected from the kind of blow the defendant gave the victim. The objections of the defendant to the answers, which were to the effect that a brain concussion and future impairment could have resulted, were upheld on appeal.

45. *E.g.*, Phillips v. State, 161 Ala. 221, 49 So. 794 (1909); Allen v. State, 149 Tex. Cr. App. 612, 197 S.W.2d 1013 (1946); Fowler v. State, 171 Tex. Crim. 600, 352 S.W.2d 838 (1962); Reynolds v. State, 372 S.W.2d 540 (Tex. Crim. 1963).

46. Cases cited note 45 *supra*.

47. 337 S.W.2d 30 (Ky. 1960).

48 *Id.*

49. State v. Redfield, 73 Iowa 643, 35 N.W. 673 (1887).

50. Fowler v. State, 171 Tex. Crim. 600, 352 S.W.2d 838 (1962) (physician testified that the victim would have a shortened leg and a permanent limp); Reynolds v. State, 372 S.W.2d 540 (Tex. Crim. 1963) (physician's testimony as to the " 'final diagnosis' " fell within Fowler rule on pain and suffering).

51. *See* cases cited notes 37-40 *supra*.

does not necessarily reflect the *nature* of the injury and no inference of an intent to kill should arise.[52] A victim, it is reasoned, could have permanent disability from injuries which may have been extensive but which, by their nature, show no intent to kill.

Length of Hospitalization Evidence

When shown to be a direct result of the victim's injuries, courts generally hold evidence of length of hospitalization admissible as tending to prove intent.[53] In *Gilmer v. State*,[54] an assault with intent to kill case, the defendant had shot the victim in the back, severing his spinal cord and paralyzing him. The victim was permitted to testify that he was moved from one hospital to another. The appellate court affirmed the ruling of the trial court, reasoning that the testimony was relevant because the defendant was charged with assault with intent to kill, and the testimony was introduced for the specific purpose of showing the nature and extent of his injuries which, in turn, show intent. Other examples of evidence of length of hospitalization admissible as tending to prove an intent to kill are: testimony by the victim that he was confined for two and a half months as a result of being knifed by defendant,[55] the attending physician's testimony as to the length of the victim's hospitalization after being stabbed a number of times,[56] and the victim's testimony that he was in the hospital two weeks subsequent to being shot in the head and that his right arm and leg were paralyzed causing him to miss school for two and a half months.[57]

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52. *See* cases cited notes 44-50 *supra*.

53. Wright v. State, 148 Ala. 596, 42 So. 745 (1907). The attending physician testified that he sutured the victim's lacerations, that the victim had lost quite a lot of blood and that the length of hospitalization was a result of the wounds. Brown v. State, 142 Ala. 287, 38 So. 268 (1904). The victim testified he was confined two and one-half months as a result of being knifed by the defendant. Shanks v. State, 80 Ga. App. 759, 57 S.E.2d 357 (1950). The attending physician testified as to the nature of the victim's injury, that the victim was rendered unconscious and was immediately taken to the hospital where he remained for two weeks, and that the victim still had to go (six months after receiving the wound) for treatment of one of the wounds. Claypoole v. Commonwealth, 355 S.W. 2d 652 (Ky. 1962) (the appeal following re-trial of appeal in 337 S.W.2d 30 (Ky. 1960)). The physician's testimony that the victim's injuries could have caused death and the victim's testimony that he was in the hospital 48½ days as a result of the wound were held admissible. Williams v. Commonwealth, 229 Ky. 580, 17 S.W.2d 706 (1929). The victim's testimony that he was carried to the hospital with a chest wound, X-rayed, and treated for eight days was held admissible in a trial for malicious shooting with intent to kill. Roberts v. State, 4 Md. App. 209, 241 A.2d 903 (1968). The victim's testimony that he was in the hospital two weeks as a result of his head wound was held admissible.

54. 157 Tex. Crim. 109, 246 S.W.2d 639 (1952).

55. Brown v. State, 142 Ala. 287, 38 So. 268 (1904).

56. Wright v. State, 148, Ala. 596, 42 So. 745 (1907).

57. Roberts v. State, 4 Md. App. 209, 241 A.2d 903 (1968).

On the other hand, in *Phillips v. State*,[58] the Supreme Court of Alabama held that a physician's testimony that he took the victim to Atlanta for treatment was inadmissible in a trial for assault with intent to kill. The testimony, said the court, "had a tendency to excite sympathy for [the victim] and prejudice against the defendant, and was likely to be misused and overestimated by the jury . . . [and] had no tendency to prove any circumstances of the shooting."[59] It appears, however, that *Phillips* represents a singular minority view, for all other cases in which the change in hospitals was shown to be a direct result of the nature and extent of the victim's injuries have allowed the admission of evidence concerning the change.

ARNETT V. STATE IN LIGHT OF THE FOUR AREAS

1. *General Rule of Relevancy*

In applying the general rule that evidence must be relevant to be admissible, many courts have established requirements of admission based on degree of persuasion.[60] Yet, the *Arnett* court leaves open the question whether the degree of persuasiveness of the evidence is to determine its admissibility. When it accepted the testimony by Bryant as to the length of his hospitalization, the Indiana court said:

> Since the evidence of the victim's hospital confinement was *relevant to an issue in the case* and since there was testimony presented that the wounds inflicted upon the witness were very severe, it was well within the discretion of the trial judge to overrule Appellant's objection and admit the testimony.[61]

It is submitted that the *Arnett* court should have discussed the length of hospitalization evidence in terms of its degree of persuasion and that it should have adopted a restrictive rule in line with *Cohn v. Saidal*.[62]

The issue in *Cohn* is similar to that in *Arnett*. In *Cohn*, the evidence of voluntary non-suit was introduced to have the jury infer the defendants had no reasonable grounds for a cause of action in their prosecution, in the other suit, against the present plaintiff. From that inference, the jury could further infer that

58. 161 Ala. 60, 49 So. 794 (1909).
59. *Id.* at 65, 49 So. at 796.
60. *See* notes 4-14 and accompanying text *supra*.
61. 244 N.E.2d at 914 (Ind. 1969) (emphasis added).
62. 71 N.H. 558, 53 A. 800 (1902). *See* notes 12-14 and accompanying text *supra*.

the defendants were guilty of the crime charged, malicious prosecution. However, other inferences, perhaps more logical, could be made from the non-suit, such as a good faith belief by the defendants that they did not have grounds for a cause of action. This inference of course, would not indicate malicious intent and the court accordingly, refused the admission of the evidence. Likewise, in *Arnett*, the length of hospitalization evidence was introduced to have the jury infer that the victim suffered injuries of a nature which would indicate intent to kill. Since the length of a victim's hospitalization depends on many factors, however, this inference is just one of many that can be derived from such evidence. Length of hospitalization can be controlled by the quality of medical care furnished the victim, the development of non-related complications or illnesses, the victim's attitude toward recovery, or the doctor-patient ratio in the hospital. None of these inferences indicate an intent to kill. The result, then, is that the jury's decision on the issue of the intent of the accused may depend upon the acceptance of one of several equally valid inferences. In fact situations like *Cohn* and *Arnett*, if the jury chooses the inference the evidence is introduced to produce, the requisite state of mind is "proven" and the defendant's case is lost. If one of the other possible inferences is allowed, however, the opposite can result.

The *Arnett* court felt justified in admitting the length of hospitalization testimony merely because it "was relevant to an issue in the case."[63] The State introduced the length of hospitalization testimony intending to produce an inference of guilt. When the *Arnett* court admitted the testimony, it dismissed the fact that the length of hospitalization testimony could also have produced an inference of innocence. To avoid denying a "beyond reasonable doubt" fair trial, it is submitted that the *Arnett* court should have adopted a restrictive rule: when evidence produces equal inferences for and against the existence of criminal intent, that evidence should be excluded before it reaches the jury, unless the intended inference can be substantiated by more convincing facts.

2. *Nature and Extent of Injuries*

The existence of Arnett's criminal intent may be inferred from the nature and extent of Bryant's injuries. This rule is well-established by case law.[64] In relying on nature and extent of injury case law for its decision, the *Arnett* court used what seems to be valid support; however, the question left unanswered by use of nature and extent of injury case law is whether length of hospitalization actually tends to prove an intent to kill. Nature and extent of injury helps to show intent but this premise does not necessarily mean that the length of hospitalization reflects the nature and ex-

63. 244 N.E.2d at 914 (Ind. 1969).
64. *See* notes 15-36 and accompanying text *supra*.

tent of injury. Since length of hospitalization may depend on factors other than the nature and extent of the victim's injuries,[65] it is submitted that length of hospitalization should be admitted only if the proponent of the evidence can show that hospitalization was caused by the nature and extent of the victim's injuries and not by other factors unrelated to the injury.

3. *Prognosis or Future Condition*

Unlike the law on the admissibility of nature and extent of injury, the law admitting prognosis, relied on by *Arnett* for support of its decision to admit evidence of length of hospitalization, is not well-established.[66] The issue raised by *Gayer v. State*[67] and *Claypoole v. Commonwealth*,[68] both cited by the majority in *Arnett*, is whether the conclusion that the victim may suffer future disability actually shows the nature and extent of the injuries, which, in turn, tends to prove an intent to kill on the part of the defendant.[69] Even if the *Gayer* view, which admitted prognosis evidence, is the more acceptable, there does not seem to be a sufficient relationship between length of hospitalization and prognosis or future condition. *Gayer* held that prognosis or future condition was relevant to an intent to kill because prognosis reflected the nature and extent of a person's injuries. But, as mentioned earlier,[70] length of hospitalization involves many factors other than the nature and extent of injury.

The *Arnett* court is now asking the jury to extend its reasoning one step further than its comparison of length of hospitalization to nature and extent of injury. The court rules that length of hospitalization may indicate a pessimistic prognosis or future condition which, in turn, shows the nature and extent of the victim's injuries and, therefore, an intent to kill on the part of the defendant. It is submitted that length of hospitalization is analogous to prognosis or future condition only when both are directly related to the nature and extent of the victim's injuries. Therefore, unless this direct relationship is shown to exist, neither prognosis nor length of hospitalization should be admitted as tending to prove an intent to kill.

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65. For possible factors involved in length of hospitalization, see p. 328 *supra*.
66. *See* notes 37-52 and accompanying text *supra*.
67. 247 Ind. 113, 210 N.E.2d 852 (1965).
68. 337 S.W.2d 30 (Ky. 1960).
69. *See* notes 37-52 and accompanying text *supra*.
70. *See* p. 328 *supra*.

4. *Length of Hospitalization*

The precise issue in *Arnett* is whether evidence of length of hospitalization should be admitted as being relevant to an intent to kill, yet the *Arnett* court did not discuss any cases where the admissibility of length of hospitalization evidence was at issue. The probable reasons for the lack of reference to length of hospitalization cases are three-fold. First, *Arnett* was a case of first impression in Indiana and the court probably preferred to make an analogy to an Indiana case on prognosis rather than to rely on outside sources. It has already been discussed that the comparison between prognosis and length of hospitalization is invalid. Second, if the *Arnett* court did consider using other jurisdictions' cases on length of hospitalization, it may have rejected a reliance on so few cases for authority. Third, and most probable, it is submitted that, even if the *Arnett* court tried to rely on other holdings favoring admitting length of hospitalization evidence, it would have found those cases distinguishable from its own.

Although *Arnett* involves evidence concerning hospital transfers made by the victim, the evidence can be distinguished from *Gilmer v. State*[71] and similar rulings.[72] The *Gilmer* court determined that the hospital transfers were made as a direct result of the nature and extent of the victim's injuries and his need for better treatment. The *Arnett* evidence, on the other hand, made no reference to the nature and extent of Bryant's injuries as related to the hospital transfers and apparently, although the opinion does not clarify the point, the length of hospitalization evidence was introduced at a different time from that concerning his injuries.[73] It is submitted that a relationship between the nature and

71. 157 Tex. Crim. 109, 246 S.W.2d 639 (1952).

72. *See* cases cited note 53 *supra*.

73. The testimony, as reported in the *Arnett* decision, reads:

'Q. Well, you were taken to a hospital, you awakened up in a hospital. What hospital was that? A. Welborn. Q. All right, how long did you remain at Welborn Hospital? A. From that time until the next Tuesday, I believe. [Objection]. Q. The question was, how long were you in the hospital at that time. [Objection] A. From Wednesday morning, April 26 until the following Tuesday, I think it was Monday or Tuesday, I really don't know, when I went to Marion. Q. Yes. Then what is Marion? A. V.A. Hospital, at Marion, Illinois. Q. How long did you remain there? At Marion? A. About two weeks. [Objection] Q. All right, after the two weeks at Marion V.A. Hospital, were you hospitalized somewhere after that? [Objection] Q. You may answer the question. A. What was the question? Q. The question was, what further hospitalization, if any, did you have after the Marion V.A. Hospital? A. I was transferred from Marion V.A. Hospital to John Cochran V.A. Hospital in St. Louis. Q. How long were you there? A. Until the 14th of August, this year. Q. And were you discharged at that time? A. For a couple of weeks. Q. All right, then did you go back to any hospital? A. Yes, sir. Q. And was that because of your condition you had originally gone for? A. Yes, sir. Q. Where did you go? A. Back to St. Louis. [Objection] Q. How long were you in the hospital altogether after the early morning of the 26th of April, this year? [Objection] A. I exactly don't remember. I know the first time

extent of a person's injuries and his length of hospitalization provides the link necessary for length of hospitalization evidence to be admissible as tending to prove the defendant's intent to kill. Therefore, the *Arnett* court erred in allowing the testimony because in that case the length of hospitalization was not shown to be directly related to the nature and extent of Bryant's injuries.

CONCLUSION

In choosing to accept the evidence of length of hospitalization as tending to prove an intent to kill, the *Arnett* court ruled that length of hospitalization was analogous not only to the nature and extent of injuries but also to prognosis or future condition. Cases appear to support the court's reliance on nature and extent of injury but there is a split of authority as to prognosis. Although the Indiana court did not cite them, cases have generally held in favor of admitting length of hospitalization evidence if the hospitalization was the direct result of the serious nature of the injury. This Note has offered that length of hospitalization is analogous neither to nature and extent of injury nor to prognosis or future condition. Also, the length of hospitalization testimony in *Arnett* was not shown to be related to the nature and extent of the victim's injuries and is therefore distinguishable from other length of hospitalization holdings. Finally, rather than allow the evidence unconditionally, the *Arnett* court should have adopted a restrictive rule reflecting the *Cohn v. Saidal*[74] desire that the evidence be relevant by a reasonable preponderance of the weight. Evidence of length of hospitalization should be admitted only when the length of hospitalization is shown to be a direct result of the serious nature of the victim's injuries.

ROBERT F. COX, JR.

I was out was the 14th of August. I have been four or five times.' 244 N.E.2d at 913-14 (Ind. 1969) (Text of objections and trial court rulings omitted).

74. 71 N.H. 558, 53 A. 800 (1902).